

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

75-4179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL DYNAMICS CORPORATION,
a corporation, and ELLIOTT
MEYER, individually and as an
officer of said corporation,

PETITIONERS,

v.

FEDERAL TRADE COMMISSION,

RESPONDENT.

On Petition to Review an Order of
the Federal Trade Commission

BRIEF FOR RESPONDENT

ROBERT J. LEWIS
General Counsel

GERALD P. NORTON
Deputy General Counsel

GERALD HARWOOD
Assistant General Counsel

JOHN T. FISCHBACH
Attorney

Attorneys for the Federal Trade Commission

Washington, D.C. 20580

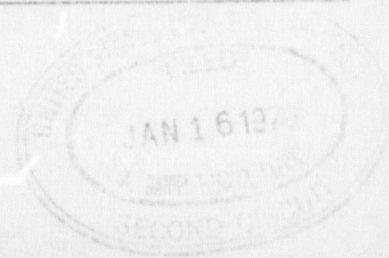


TABLE OF CONTENTS

	Page
Questions Presented -----	1
Counterstatement of the Case -----	1
Summary of the Facts -----	2
Summary of Argument -----	4
Argument -----	4
Preliminary Statement -----	4
I. The Commission's order is in compliance with the direction of this Court -----	8
A. The prohibition on representations of potential earnings -----	8
B. The representations as to past earnings of purchasers of NDC's products permitted within the order comply with this Court's decision of March 6, 1974 -----	11
C. Paragraph 2 of the order is in accordance with the Court's directions on remand -----	15
II. NDC's belated contention that the Commission's order violates its First Amendment rights is without merit -----	18
Conclusion -----	21
Addendum -----	S-1

TABLE OF CITATIONS

Cases	Page
<u>Bigelow v. Virginia</u> , 421 U.S. 809 (1975) -----	4, 18, 19, 21
<u>Boyce Motor Lines, Inc. v. United States</u> , 342 U.S. 337 (1962) -----	14
<u>Brown & Williamson Tobacco Corp. v.</u> <u>Engman</u> , Nos. 75-6081, -6084-85, -6087-88, -6090, 2d Cir., decided December 22, 1975 -----	15
<u>Charles of the Ritz Distributing Corporation</u> <u>v. Federal Trade Commission</u> , 143 F.2d 676 (2d Cir. 1944) -----	14
<u>Double Eagle Lubricants, Inc. v. Federal</u> <u>Trade Commission</u> , 360 F.2d 268 (10th Cir. 1965), <u>appeal dismissed</u> , 384 U.S. 434 (1966) -----	17
<u>E. F. Drew & Company v. Federal Trade</u> <u>Commission</u> , 235 F.2d 735 (2d Cir. 1956), <u>cert. denied</u> , 352 U.S. 969 (1957) -----	20
<u>Federal Communications Commission v. Pottsville</u> <u>Broadcasting Co.</u> , 309 U.S. 134 (1940) -----	5
<u>Federal Trade Commission v. Colgate-Palmolive</u> <u>Company</u> , 380 U.S. 374 (1965) -----	5, 6, 14, 20
<u>Federal Trade Commission v. J. Weingarten,</u> <u>Inc.</u> , 336 F.2d 687 (5th Cir. 1964), <u>cert. denied</u> , 380 U.S. 908 (1965) -----	5
<u>Federal Trade Commission v. National</u> <u>Lead Company</u> , 352 U.S. 419 (1957) -----	6, 20
<u>Federated Nationwide Wholesalers Service</u> <u>v. Federal Trade Commission</u> , 398 F.2d 253 (2d Cir. 1968) -----	13
<u>In the Matter of Federated Sanitary Corp.,</u> <u>et al.</u> , Docket Number C-2627 (Consent order issued January 27, 1975) -----	9
<u>In the Matter of International Marketing</u> <u>Corp., et al.</u> , 82 F.T.C. 1074 (1973) -----	10-11

Cases (continued)

<u>In the Matter of Interstate Publishers Service, Inc., et al., 82 F.T.C. 364 (1973)</u> -----	11
<u>In the Matter of Pfizer, Inc., 81 F.T.C. 23 (1972)</u> -----	14
<u>In the Matter of Universal Credit Acceptance Corporation, et al., 82 F.T.C. 570 (1973), aff'd and modified sub nom. Heater v. Federal Trade Commission, 503 F.2d 321 (9th Cir. 1974)</u> -----	10
<u>Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 (1946)</u> -----	6
<u>Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)</u> -----	19
<u>National Dynamics Corp. v. Federal Trade Commission, 492 F.2d 1333 (2d Cir. 1974), cert. denied, 419 U.S. 993 (1974)</u> -----	3
<u>P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52 (4th Cir. 1950)</u> -----	5, 17
<u>Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)</u> -----	19
<u>Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947)</u> -----	5
<u>United States v. An Article Consisting of 216 Cartoned Bottles, 409 F.2d 734 (2d Cir. 1969)</u> -----	14

Statute:

Page

Federal Trade Commission Act:

Section 5, 15 U.S.C. § 45 -----	2
Section 5(a)(2), 15 U.S.C. § 45(a)(2) -----	16
Section 5(b), 15 U.S.C. § 45(b) -----	19
Section 5(c), 15 U.S.C. § 45(c) -----	22

Rules:

Federal Trade Commission Rules of Practice

16 C.F.R. § 3.55 -----	19
16 C.F.R. § 3.61(b) -----	14
16 C.F.R. § 71(b) -----	14
16 D.F.R. § 72 -----	19

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4179

NATIONAL DYNAMICS CORPORATION,
a CORPORATION, and ELLIOTT
MEYER, individually and as an
officer of said corporation,

PETITIONERS,

v.

FEDERAL TRADE COMMISSION,

RESPONDENT.

On Petition to Review an Order of
the Federal Trade Commission

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Does the Commission's reformulation of paragraphs one and two of its order comply with the directions given by this Court in its opinion dated March 6, 1974?
2. Does the Commission's order prohibiting false advertising by petitioners violate the Constitution?

COUNTERSTATEMENT OF THE CASE

The statement of the procedural posture of the case contained in the brief of petitioners ("NDC")^{1/} is essentially

^{1/} Hereinafter Petitioners' Brief shall be referred to as "Br.", and the Appendix as "App."

accurate. The Commission notes, however, that NDC's construction of the initial order of the administrative law judge (Br. p. 4) is at variance with the plain language of that order (App. pp. 80a-82a). That order in fact not only prohibited representations of past earnings of specific distributors of VX 6 unless such claims represented earnings of a substantial number of agents, as claimed by NDC, but also prohibited any representations of potential earnings unless they in fact accurately reflected the average earnings of a substantial number of purchasers of NDC's products under circumstances similar to those of the purchasers to whom the representations were made. Further, all misrepresentations in any manner whatsoever of past, present or future profits or earnings derived or to be derived from the resale of NDC's products were prohibited.

SUMMARY OF THE FACTS

The facts underlying the order in question here are relatively simple. They were considered by this Court in connection with its earlier decision remanding the two order paragraphs at issue here to the Commission. In brief, the Commission found that NDC had been violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, inter alia, misrepresenting the potential and actual earnings

of persons purchasing NDC's products for resale. The misrepresentations included representations of overall earnings of all customers ("OUR MEN MADE MORE THAN \$4,000,000 IN PROFITS and haven't even scratched the surface yet!"), representations as to annual earnings ("I talk big figures, \$10,000, \$15,000, \$25,000 a year . . . VX 6 is the Aladdin's Lamp of Specialty Selling."), and similar representations of daily weekly and monthly amounts. (Initial decision of administrative law judge, App. at 38a.)

This Court, in its decision issued March 6, 1974, found no fault with the Commission's findings of fact with respect to the violations by NDC of the Federal Trade Commission Act in their representations of earnings, and the Court affirmed and enforced the bulk of the Commission's order. Natonal Dynamics Corp. v. Federal Trade Commission, 492 F.2d 1333 (2d Cir. 1974), cert. denied, 419 U.S. 993 (1974). However, this Court remanded the two paragraphs of the order concerned with remedying these violations on the basis that "the language is not well adapted to carrying out this sound purpose [of distinguishing between earnings of part time and full time salesmen]." (App. at 115a).

No new factual material was introduced by either side in the proceedings before the Commission following this Court's remand of these paragraphs of the order.

SUMMARY OF ARGUMENT

The Commission's reformulations of paragraphs one and two of its order directed against NDC are in conformity with the direction of this Court contained in its opinion dated March 6, 1974. NDC should not be permitted here to relitigate the factual underpinnings of the order, nor should it be permitted to use methods which the Commission has properly found are deceptive. The Commission has carefully included in its order all the exemptions suggested by this Court, while at the same time taking due account of the need of the public to be protected from NDC's misleading representations.

NDC's constitutional argument, made here for the first time, is without merit. The recent Supreme Court decision in Bigelow v. Virginia, 421 U.S. 809 (1975), expressly does not apply to orders based on false or misleading advertising such as that of NDC.

ARGUMENT

Preliminary Statement

In this case, the Commission has, while taking into account and, in its view, fully complying with the directions of the Court as contained in its decision on its initial review of the order, also taken into account the policies of the Act which it administers in order to protect the public. This is in accordance with the established principle that the Commission

is entitled to reasonable latitude in giving effect to the directions of reviewing courts on remand. Cf. P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 55 (4th Cir. 1950); Federal Trade Commission v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). So long as the Commission's new order does not conflict with the reviewing court's mandate, the Commission is entitled to exercise its discretion to fashion appropriate remedies within the scope of the statutes which it is enforcing. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 379 (1965), citing Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 200 (1947) and Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940), which are also pertinent here.

Thus the Commission, in complying with this Court's mandate, has completely recast and reformulated the bulk of the remanded paragraphs of its order. It has expressly permitted the use of accurate and properly qualified statements of the sales, earnings or profits of individuals or of substantial numbers of NDC's customers, as well as representations of reasonable ranges of sales, earnings or profits of such customers.^{2/} Thus the Commission has

^{2/} The Commission has found it appropriate to be specific as to which ranges are reasonable. As it points out in its opinion

(Continued)

extended to NDC all of the advantages which this Court sought to ensure would accrue to it, while at the same time carrying out its duty to protect the public from NDC's "deceptive use of unusual earnings realized only by a few," (App. at 115a) or use of representations for which it has no reasonable basis.

The provisions of the original order which this Court found objectionable on grounds of vagueness were designed, inter alia, to require NDC to cease from representing as typical the earnings of full time distributors in advertisements directed primarily at an audience of potential part-time distributors, as well as to require NDC to refrain from making deceptive use of the earnings of a few exceptional individuals. In its consideration of the matter on remand, however, the Commission concluded:

[W]ith respect to the words "circumstances similar to those of the purchaser or prospective purchaser," to which the Court objected, complaint counsel note that inclusion of these words may be unnecessarily cautious inasmuch as most of [NDC's] distributors are part-time and any figures (mean, median, range) based on the

2/ (Continued)

(App. at 179a-182a), completely open ranges may be too easily used to deceive the public. This limitation is reasonably related to the violation found and well within the power of the Commission to frame remedial orders. Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 611 (1946); Federal Trade Commission v. National Lead Co., 352 U.S. 419, 429 (1957); Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 390 (1965).

performance of a large number of distributors would necessarily be largely results of part-time performers. In light of this, the Commission has determined to simply omit the language to which the Court had objected. [App. at 150a.]

Thus the revised order is designed to eliminate the potential for misrepresentation by use of the earnings of full time distributors by requiring: (1) that the results be appropriately qualified in the case of advertisements of individual earnings, or (2) in cases where overall figures or ranges are being used, that they be those of either all purchasers of NDC's products during any stated time period or of a substantial number of purchasers during any stated time period or that NDC state the percentage which purchasers achieving stated results within an advertised range constitute of the entire number of NDC's purchasers (or, in appropriate circumstances, a simple statement of the number of purchasers within each range in lieu of the percentage).

NDC, in its Brief, has dissected the order in question into parts selected to facilitate its attack upon it. The Commission suggests, however, that the order should be considered as a whole in order to ascertain whether or not it complies with the mandate of this Court and is otherwise in accordance with law. The text of the order in full is reproduced in the Appendix at pages 173a-176a.

I. The Commission's order is in compliance with the directions of this Court.

A. The prohibition on representations of potential earnings.

NDC complains that the prohibition on representations of potential earnings of persons purchasing their product for resale is inconsistent with this Court's opinion and with prior practice of the Commission. Both of these allegations are without merit. The language in question, which prohibits NDC from "representing, directly or by implication, that persons purchasing [NDC's] product can or will derive any stated amount of sales, profits or earnings . . .," is precisely the same in the revised order as in the earlier order. In its opinion this Court did not in any way indicate disapproval of that provision, but only indicated disapproval of the limitations placed by the Commission on qualified representations of actual earnings of purchasers of NDC's products. Thus, the Commission found no occasion under the Court's remand to change this portion of the order, which it found fully warranted in its previous decision.

With respect to its contention that this formulation is inconsistent with the Commission's prior practice in other matters, NDC has cited only two matters, neither of which supports the contention. In the first, NDC refers to a letter assuring voluntary compliance in an investigation

of Merlite Industries, Inc., File Number 652 3049, dated March 1, 1967. In that matter, however, the Commission found no occasion to issue a complaint or in any way adjudicate whether or not Merlite had been in violation of the Federal Trade Commission Act. Here petitioners' violations have been fully investigated and adjudicated (on the basis of an extensive evidentiary record) and the Commission has made findings of fact which support its order. The circumstances of the two matters are thus not at all similar. The Commission's acceptance of such an assurance in settlement of a matter under investigation does not require the Commission to adhere to an identical form of relief in all subsequent matters presenting similar issues, and particularly not in litigated orders based on records that may warrant additional or different relief.

As for In the Matter of Federated Sanitary Corp., Docket Number C-2627, (Consent Order issued January 27, 1975), NDC has misinterpreted the language of the order. That order, as cited by petitioners (Br. at p. 7), bars Federated Sanitary and its president from "representing, directly or by implication, that individuals will earn any stated gross or net amount" The order thus, in fact, does prohibit any representation of potential earnings of individuals purchasing products of Federated Sanitary for resale. The omission of the word "can" in the Federated Sanitary order is of no moment,

since it is the position of the Commission that the words "will" or "can" are, for purposes of this order, essentially the same. In Federated Sanitary, as in the instant case, a prohibition on all representations of potential earnings was included in the order. NDC's contrary construction of that order is erroneous.^{3/}

The Federated Sanitary matter does not stand alone with the order involved in this case in carrying with it a prohibition against representations of potential earnings. Other examples are abundant. A few include In the Matter of Universal Credit Acceptance Corp., et al., 82 F.T.C. 570, 669 (1973), aff'd and modified sub nom. Heater v. Federal Trade Commission, 503 F.2d 321 (9th Cir. 1974);^{4/} In the Matter of International

^{3/} The qualifying phrase in the Federated Sanitary order, "unless the pertinent facts wit' respect to such earnings are disclosed," applies only to representations of the earnings of a small number of individuals, as a fair reading of the language shows. NDC's attempt (Br. at 8) to make it apply also to representations as to potential earnings is not justified, either by the punctuation or the grammatical construction of the sentence. The quoted paragraph from the order consists of two independent clauses joined by the disjunctive "or." Indeed, it is only with respect to actual earnings that disclosure of the "pertinent facts" makes sense. To allow disclosure of "pertinent facts" with respect to potential earnings would be to invite misrepresentations, not to stop them.

^{4/} The language of that prohibition required the respondents to cease and desist from directly or by implication "representing that franchisees will earn or can reasonably expect to earn or receive any stated or gross or net amount of earnings or profits" The order in this matter was reviewed by the Court of Appeals solely on other grounds, so that its decision has no bearing on the language in question.

Marketing Corp., et al., 82 F.T.C. 1074, 1079 (1973);^{5/}
and In the Matter of Interstate Publishers Service, Inc.,
et al., 82 F.T.C. 364, 373 (1973).^{6/}

Thus it is plain that the Commission is acting with respect to NDC in a manner consistent with the approach it has taken in similar cases where baseless and/or misleading representations of potential earnings have been made in the past.

In any event, however, the Commission is not bound by the language of previous orders in similar cases. Each order must be based ultimately on the facts of the particular case.

Inasmuch as this Court found no fault with this portion of the order in its initial determination, it is inappropriate for NDC to be permitted to relitigate this matter now.

- B. The representations as to past earnings of purchasers of NDC's products permitted within the order comply with this Court's decision of March 6, 1974.

In its opinion remanding the original order to the Commission, this Court, after having approved the efforts of the Commission to require petitioners to disclose whether the distributors whose earnings they represented were part

^{5/} The language in that case prohibited representations that "franchisees or distributors of respondents' products will earn or receive any stated or gross or net amount of earnings or profits"

^{6/} The prohibition in that case required the respondents to cease "representing, directly or by implication, to prospective solicitors or solicitors that they will earn or receive \$175 per week or any other stated or gross amount"

time or full time or were otherwise unrepresentative, added:

We likewise do not see why [NDC] should be limited to advertising only the average sales or earnings of [its] distributors rather than be permitted to state ranges for various types of distributors provided [it does] not make deceptive use of unusual earnings realized only by a few. (App. at 115a.)

These constitute the sole directions by this Court to the Commission with respect to adding representations to be permitted, and, in the Commission's view, the Commission has more than met those requirements. Its order herein expressly authorizes NDC to use not only statements of average or median sales, profits or earnings actually achieved by all of the purchasers of its products during any stated time period, but also: statements of sales, profits or earnings actually earned or exceeded by any substantial number of such purchasers during any stated time period; representations of reasonable ranges of sales, profits or earnings actually achieved by purchasers of their products for any stated period of time; or truthful testimonials regarding sales, profits or earnings achieved by individual purchasers of their products, provided that such statements are qualified to prevent deception of the public.^{7/}

^{7/} NDC erroneously asserts that the order would not permit the description of the earnings of particular individuals without the use of the name of the individual earning them. (Br. pp. 14-15). Such a limitation is not to be found in the order. NDC is free to advertise individual earnings without mentioning the name of the person achieving such earnings so long as they make the qualifying statements and maintain the substantiating records (App. at 174a) required by the order.

NDC, however, argues that these provisions are too narrow since they require representations to be "true" or "accurate."^{8/} NDC's assertion that the requirement by the Commission that its advertising with respect to representations of earnings be truthful or accurate would somehow place the burden upon it to demonstrate that it was in compliance with the Commission's order is ill-founded. The Commission's order does not constitute "legislation of 'truth'" (Br. p. 15). The truth or accuracy of any particular representation by NDC will stand or fall on the facts in each instance. There is no suggestion in the order or elsewhere in the record that if the Commission finds it necessary in the future to seek enforcement of its order it will do other than carry the burden of proof which the law has placed upon it.^{9/}

^{8/} Federated Nationwide Wholesalers Service v. Federal Trade Commission, 398 F.2d 253 (2d Cir. 1968), cited by NDC (Br. p. 11) is inapposite. There this Court ruled that the Commission had exceeded its authority by apparently shifting the burden of proof from itself to the respondents. The Court accordingly modified the final order. This Court did not, however, permit indiscriminate advertising which, although possibly literally true, would be misleading. The restraints approved in that case were similar in substance to those involved here.

^{9/} NDC contends that there is a "significant" difference between the words "true" and "accurate." The Commission finds this difference to be fanciful rather than real. In its view, the terms are interchangeable as they are used here. Indeed, in its proposed order NDC used both terms in

(Continued)

In other words, the Commission has the burden of proving any violations of its order should the need to do so arise in the future. To the extent that NDC wishes to make representations which can only be verified through the use of statistical computations, it obviously runs the risk of differing interpretations. As NDC points out, the Commission's procedure for guidance is open to it, 16 C.F.R. § 3.61(b), 3.71(b). NDC should remember that no one is requiring it to make such representations in the first place, and that it is clear as a matter of law that the Commission may require it to have some reasonable basis for such representations if they choose to make them. E.g., In the Matter of Pfizer, Inc., 81 F.T.C. 23 (1972). It is not "'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340." Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 393 (1965). In any event, NDC will be entitled to

9 / (Continued)

contexts suggesting no difference in meanings between "truthful" and "accurate" (App. at 131a-132a). In any event, assuming, arguendo, that there is a distinction between "accurate" claims based on statistics as to sales, profits and earnings and "truthful" claims based thereon, the Commission is justified in insisting upon truthfulness in NDC's advertising. E.g., Charles of the Ritz Distributing Corp. v. Federal Trade Commission, 143 F.2d 676, 679-680 (2d Cir. 1944). The public is entitled to no less. Cf. United States v. An Article Consisting of 216 Cartoned Bottles, 409 F.2d 734, 740-742 (2d Cir. 1969).

a full hearing before a court in an enforcement proceeding if ^{it} they disagree with the Commission's position in such matters. Cf. Brown & Williamson Tobacco Corp. v. Engman, Nos. 75-6081, -6084-85, -6087-88, -6090, 2d Cir., decided December 22, 1975.

C. Paragraph 2 of the order is in accordance with the Court's directions on remand.

Paragraph 2 of the original order of the Commission was remanded by the Court for changes to conform with the changes in paragraph 1. This the Commission has done. The amended order simply requires NDC to maintain records which will provide a reasonable basis for any representations which it makes concerning past or present sales, profits or earnings of its distributors, including, in the event it chooses to make such representations, records indicating amounts earned or sold, the number or percentage of purchasers achieving results represented, the time period in which such results were achieved, and the amount of time per day, week or month required to achieve such results. Thus the provision in effect requires NDC to keep records which substantiate whatever representations in the subject of earnings, sales or profits it chooses to make.

NDC claims, however, that the Court in its earlier order required the Commission to accept as proof positive amounts of sales in dollars by NDC's customers records

showing sales to each distributor and a mechanical application of the "permitted mark-up" formula. Such a construction, however, does not appear to the Commission to be what the Court intended, since the Court clearly qualified its remarks on this subject by saying that such records "would suffice if the representation were similarly limited." (App. at 116a.) Obviously, repeat purchasing by a customer may be some indication of the sales of that customer by unit volume. For example, if Customer A purchases ten cases of NDC's product and subsequently reorders an additional ten cases, it is a fair assumption that Customer A has sold or otherwise disposed of all or most of the initial ten cases. To presume that the customer sold them at any particular mark-up, however, is not possible. For example, NDC would have no way of knowing whether the sales were made to individual customers or dealers. As NDC pointed out repeatedly in its literature, sales can be made at any level of distribution by its customers. (E.g., record at pages 1479, 1681, 1690, reproduced in an Addendum to this Brief for the convenience of the Court.) NDC could not, without more information from its customers, know whether the customers had sold the products at wholesale or at retail. Further, in light of the provisions of Public Law 94-145, enacted December 12, 1975, repealing the resale price maintenance provision of Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), NDC is no longer

in a position to control the prices at which its products are resold. Thus a presumption that resales will be at any particular price or prices is untenable.

In the Commission's view, the formulation proposed by NDC (App. at 132a) is not in accordance with the Court's determination which would permit the use of such sales records by NDC only in cases where representations were similarly limited. Rather, NDC's order would, in effect, amount to a license for it to mislead the public. This,^{10/} the Commission is sure, was not intended by this Court.

^{10/} NDC's argument on this point rests upon the assumption that this Court in effect directed both (1) that Paragraph 1 of the order be revised to permit representations reflecting sales to each distributor and NDC's permitted markup, and (2) in any event, that Paragraph 2 should be revised to permit NDC to satisfy its recordkeeping requirements by keeping records of those two items. However, the portion of the Court's opinion invoked by NDC (App. at 116a) was merely the Court's characterization of Commission counsel's response to NDC's claim that it was not feasible to comply with the recordkeeping requirements of the original order. Neither the Court, the Commission, nor its counsel asserted that Paragraph 1 of the order would or should permit representations based on the "permitted markup." The Court's observation that "this paragraph should be clarified as indicated" (App. at 116a), coming after a discussion of other specific criticisms plainly requiring rewriting (App. at 115a-116a), does not seem intended to require the revised order to embody the Court's reference to Commission counsel's response concerning sales records. In any event, it has been held that the Commission itself should not be estopped by its counsel's statements concerning the meaning of its orders from prohibiting practices capable of being deceptive. Double Eagle Lubricants, Inc. v. Federal Trade Commission, 360 F.2d 268, 270 (10th Cir. 1965); P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 55-56 (4th Cir. 1950).

Further, NDC would have no way of knowing from simple sales records the amounts expended by any of its customers in connection with the product, even if they were to sell it at the usual mark-up price. Representations as to profits or earnings could not properly be based on sales volumes alone.

II. NDC's belated contention that the Commission's order violates its First Amendment rights is without merit.

NDC contends (Br. pp. 8-11) that the provision of Paragraph 1 of the order generally prohibiting it, subject to specified exceptions, from representing past or present sales, profits, or earnings, constitutes a "prior restraint" in violation of the First Amendment. This contention, however, would have been equally applicable vel non to the Commission's original order, yet it is made for the very first time in this Court. It was not made before the Commission nor was it made before this Court on the prior appeal. Accordingly, the contention is not properly before the Court.

NDC's reliance upon the decision in Bigelow v. Virginia, 421 U.S. 809 (1975), does not justify its belated effort to make this a constitutional case. Insofar as Bigelow stands for the proposition, as asserted by NDC -- that commercial advertisements "not stripped of First Amendment protection" (Br. p. 9) -- it endorsed a principle foreshadowed in prior Supreme Court decisions (see, e.g., Pittsburgh Press Co. v.

Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 393, 398, 401 (1973); Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n. 6 (1974)) as the Court itself acknowledged. 421 U.S. at 818-26. Bigelow itself was decided prior to the Commission's decision and order on remand under review here, yet NDC sought neither reconsideration nor reopening, as it was entitled to do. See 15 U.S.C. § 45(b); 16 C.F.R. §§ 3.55, 3.72.

In any event, there is no merit to NDC's claim that the order conflicts with the decision of the Supreme Court in Bigelow v. Virginia, 421 U.S. 809 (1975). That case does not impair the well-established authority of the Government to restrain false, misleading or fraudulent commercial advertising. That case involved the prosecution of a newspaper editor, whose paper had published in Virginia a truthful advertisement containing information about abortions performed in New York, for violation of a Virginia statute prohibiting the publication of information about abortions. In holding the statute unconstitutional as applied, the Court rested on the state's lack of any valid regulatory interest in the subject of the advertisements. However, the Court specifically noted that its decision did not apply to "deceptive or fraudulent" advertisements (421 U.S. at 828), and added that a different case might be presented if the statute were "applied against the advertiser rather than the publisher."

Id. NDC's claim of a conflict with Bigelow is thus without substance.

The constitutionality of the Federal Trade Commission Act has long been established, and it has been consistently held that, "[t]here is no constitutional right to disseminate false or misleading advertisements." E. F. Drew & Company v. Federal Trade Commission, 235 F.2d 735, 740 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1957). NDC, having been found in violation of the Federal Trade Commission Act, has been afforded ample room in which to advertise in a non-deceptive manner. It cannot now reasonably expect the same leeway as one who had not similarly engaged in deceptive conduct. Federal Trade Commission v. National Lead Co., 352 U.S. 419, 431 (1957); Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 395.^{11/} To the extent that the order may prohibit NDC from making truthful representations about past or present earnings, sales, or profits,^{12/} it is justified

^{11/} The doctrine of "fencing in" of past violators is not "shopworn" as NDC contends. (Br. p. 11). It is a judicial recognition of the sound principles that an order should effectively close all roads to the prohibited goal and that a respondent should not be able to circumvent an order by slight changes in the form of his practice which do not cure the misrepresentations found.

^{12/} As we have shown (see n. 7 on p. 12 supra), the only example of such a prohibited representation cited by NDC (Br. pp. 14-15) rests upon a misapprehension of the scope of the order.

by the need to curb NDC's proclivity to overstate; thus the order constitutes "reasonable regulation that serves a legitimate public interest." Bigelow v. Virginia, supra, 421 U.S. at 826. That substantial governmental interest plainly outweighs any such First Amendment interest NDC might have in making the prohibited representations.^{13/}

CONCLUSION

It is clear from the foregoing that the Commission has carefully considered the order provisions remanded to it by this Court and has reformulated them in such a way as to fulfill its statutory duty under the Federal Trade Commission Act while at the same time complying with the directions of this Court expressed in its opinion of March 6, 1974. The order provisions are clear and specific, providing NDC with the leeway directed by this Court but preventing it from making deceptive use of unusual sales, earnings or profits realized by only a few of its customers. The order, which

^{13/} The Court found it necessary to assess the substantiality of the governmental regulatory interest in Bigelow only because it found that the advertisement in question "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message * * * involve the exercise of the freedom of communicating information and disseminating opinion." 421 U.S. at 822. NDC makes -- indeed, can make -- no claim that the representations prohibited by the order are of this character.

this Court previously found to be based upon substantial evidence, is a sound one and should therefore be affirmed and enforced by this Court.^{14/}

ROBERT J. LEWIS
General Counsel

GERALD P. NORTON
Deputy General Counsel

GERALD HARWOOD
Assistant General Counsel

JOHN T. FISCHBACH
Attorney

Attorneys for the Federal Trade Commission

Washington, D.C. 20580

January 1976

^{14/} "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5(c), 15 U.S.C. § 45(c).

A D D E N D U M

NATIONAL DYNAMICS CORPORATION

220 EAST TWENTY-THIRD STREET, NEW YORK 10, N.Y. • Murray Hill 9-0180

FEDERAL TRADE COMMISSION		
Docket No. <u>8803</u>	COMMISSION Exhibit No. <u>1A</u>	
In the Matter of <u>Natl. Dynamics Corp.</u>		
Date _____	Witness _____	Reporter _____

PROVE VX6 AT
MY EXPENSE!

Dear Friend,

Since I told Andy Scott to answer your inquiry, hundreds of men just like you have taken their step toward financial security and prestige by becoming VX6 dealers in their territory--your territory is still open, the opportunity is still there and that is why I am writing to you again.

Let's speak frankly to each other--there can be only two reasons why you haven't accepted our dealership. The first is that you've lost interest in such a career. If that is so, I wish you would write 'Not interested' at the bottom of this letter and sign your name. Return it to me so I can stop bothering you and can answer other inquiries from your territory.

The second reason for delay is that the most powerful sales kit in the history of direct selling has not convinced you how good VX6 is.

Well I'm prepared to prove, at no risk to you whatsoever, that everything I say about VX6 is true. Send in the enclosed money back guarantee order blank and I will hold your territory while you are proving to yourself that VX6 is the golden opportunity for you. When you get your first order, just take a package of VX6 to a skeptic or prospective owner. Put it in his or your own mechanically sound battery. Then give it the 'Torture Test'--with lights on and ignition off, step on the starter and run the battery down--completely until it is so 'dead' the lights won't even function. Now wait three minutes with the lights off. Step on the starter. The battery will start your car with a surge of power it has regained in those few minutes. If this doesn't convince you and your customer, just send me a bill for your time and trouble and forget VX6.

I talk big figures, \$10,000, \$15,000, \$25,000 a year. Maybe you find these amounts unbelievable. Perhaps you say "For others, maybe, for me, impossible." "Don't sell yourself short." VX6 is the Aladdin's Lamp of Specialty Selling. You don't need technical experiences, special education, or fancy talk to succeed.

Take me up on my offer if you want the kind of money other VX6 men are making all over the country. You don't risk a single penny! This offer is made to order for you if you are "from Missouri" and must be shown.

1418

CX 4-A

S-1

I am sure you have already guessed why I am making you an offer by which you can't lose. You know there's no profit in shipping you three dozen packages of VX6 only to have them come back. My reason is my sincere conviction, based upon thousands of cases like yours that once you have seen VX6, once you give it the amazing 'torture test' in front of a few friends -- well, you won't return your shipment. Instead you'll go out and sell that three dozen so fast you'll order more right away!

You'll make about \$60.00 profit selling this test order. But this is only small change compared to the money you'll make when you really get going and get those repeat orders from service stations and business from fleets and sub-agents.

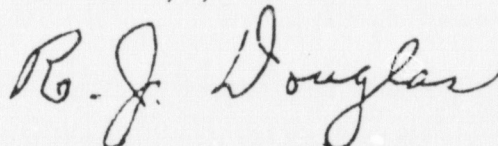
Once you get a taste of the money that VX6 pays, you'll understand why this is the world's biggest seller in its class and why more men are making this their career every day!

I could send you hundreds of letters from salesmen all over America, from keen experienced business men to mere beginners who have never sold anything before--all these letters will tell you the same story: "VX6 is the hottest, fastest, biggest money maker they have ever tackled." But I won't do that. I don't want men influenced by 'blue sky' stories. I want you to prove to yourself, in your own way, that everything I say is the truth. And that is why I figured out this offer because it gives you the opportunity to find out without risking a penny.

I am telling Andy Scott to expect your answer by return mail and to hold your territory. I am also instructing him that when he receives your order to include your area in our advertising and publicity campaign which is designed to pre-sell VX6 for you.

Act now while your territory is still available--next week may be too late.

Cordially yours,



R. J. Douglas, Asst. to the Pres.
National Dynamics Corp.

RJD:il
Copy to A. Scott

14119

S-2

FEDERAL TRADE COMMISSION

Product No. 5503 Com. Section's Exhibit No. EX-4-13

NATIONAL DYNAMICS CORPORATION

221 WEST TWENTY-THIRD STREET, NEW YORK 10, N. Y. • MURRAY HILL 2-0180 • CABLE: NATIDYN

From Andy Scott
National Dynamics Corp.
New York, N.Y.

FEDERAL TRADE COMMISSION		
Docket No. <u>8803</u>	Exhibit No. <u>31A</u>	
In the Matter of <u>Nat'l Dynamics Corp.</u>		
Date _____	Witness _____	Reporter _____

One Quick Phone Call - At No Expense --
And You Can Choose How Much You Want To Earn This Year -
() \$2,000.00 () \$5,000.00 () \$10,000.00
() \$15,000.00 () \$25,000.00

You'll know it is possible when you read these facts. So, read this carefully.

If you're currently making less than \$10,000 per year, you can pick up your telephone right now and take the first step toward literally DOUBLING your income.

Sound too good to be true? Maybe it does, but I'm willing to put my money where my mouth is, because I'm going to pay for the phone call! Let me explain --

But if you're busy right now, sit down in a quiet place after dinner and spend a few minutes on your future. Please don't try to read this material in a hurry. You will be richly rewarded for this investment of time and thought. This could be the turning point of your future.

You see, my company specializes in helping sincere, responsible men start a business of their own ... WITHOUT giving up their present jobs, and WITHOUT risking one red cent of their own money. Our program is simple, direct, and foolproof. Thousands of men all over the country are using this program to build better futures for their families.

I've listed the names and phone numbers of some of these men in the circular I'm enclosing with this letter. I'd like you to call the man nearest you and talk over this program with him. Find out first hand what it can mean to you!

You'll find out that the heart of this fantastic money making program is a modern chemical discovery called VX-6 Battery Additive, the best known and biggest selling product of its kind in the world.

WHAT IS VX-6?

VX-6 is a battery additive, so important, powerful interests have tried to keep it off the market for years. Now you can get in on the ground floor. VX-6 is the hottest item to hit specialty selling field, ever. There is not another automotive product on the market today that has the exciting, natural consumer appeal that VX-6 has. Here is a product that not only ends battery troubles forever, but gives more electrical power. Safety and effectiveness in one package! At a price everybody can afford. Every car owner, every business, every operator of a boat, truck or machine using wet cell batteries is a perfect prospect.

NO DEMONSTRATION TO PROVE NEED FOR VX-6

VX-6 is a sight seller. Just point to the tell tale green or white powdery formation around the battery. This is the sulphation which chokes the battery to death. VX-6 prevents this and restores life to the battery.

I've sold a lot of top products for a lot of years, but I tell you, without question, that I've never seen a product move with the speed and the profit that VX-6 does. And I think the answer is simple. Today, the motoring public is conscious of premium batteries, lifetime batteries and even cadmium batteries. Check your magazine ads, newspaper ads and radio and T.V., you'll see this is a fact. You'll find that these batteries cost anywhere from \$40.00 to over \$100.00 for industrial batteries. Secondly, every driver has a dread of getting stuck unexpectedly from a run down or dying battery. This is why VX-6 sells like hot cakes.

THE AVERAGE MAN WANTS THIS PROTECTION FOR HIMSELF AND HIS FAMILY BUT HE CAN'T AFFORD THE \$40.00 TO \$100.00 PRICE. THAT IS WHY HE BUYS VX-6. HE GETS THE SAME PROTECTION FOR ONLY \$2.98.

READ THESE FACTS

1. VX-6 has the largest potential market of any automotive product. Every home has one or more cars. Every farm, industrial plant, delivery fleet, taxi, etc. needs and must have this protection.
2. VX-6 is a small package and requires little storage space. You can double up on your selling by showing VX-6 along with any other line you may be handling.
3. VX-6 can be sold through more channels than any other direct selling product.
4. LARGER PERCENTAGE OF PROFIT ON SALES.
5. Additional sales developed through word of mouth advertising, from happy users.
6. VX-6 is backed up with national advertising in magazines and newspapers to pre-sell your customers.
7. There are 70 million cars on the road. Every car, new or old needs VX-6.
8. VX-6 is now being sold in leading gas stations and automotive supply stores.

Now you can see why I said earlier this is the hottest item to hit direct selling.

But now let's talk about YOU. I need a good man in your area to help cash in on the eager and growing market for VX-6. If you can spare just a few hours per week, and would like to start a business that can bring you as much as \$20,000 per year OR EVEN MORE, I think you owe it to yourself to think about getting on the VX-6 bandwagon!

You don't need any special education or experience to make really BIG money with VX-6. Even if you've never sold a thing in your life, you can start making good money right away, without any long-winded "sales pitches," just by following a proven, step-by-step program that takes all the "sell" out of selling!

BIG PROFITS!

Now I want to tell you, you CAN'T BEAT A PROFIT MAKING DEAL LIKE THIS ONE! On a \$2.98 sale, you can make \$1.65 selling direct to customers and fleet installations. Or, if you sell dealers you make \$7.67 a dozen. Obviously, you won't make as much profit per package selling wholesale but your profit per visit will run higher. On an average wholesale sales a day you make over \$46.00 and then your big profit is yet to come - in the form of repeat orders from these same dealers.

1479

OUR MEN ARE MAKING MONEY

Take the case of Bernie Azif - Bernie is an ordinary fellow like you and me. He invested a few hundred dollars in VX-6 about 4 years ago. Today he is an established respected member of his community. He has a business worth over \$20,000.00! He owns his own home and cars! He had none of this when he started handling VX-6.

S.A. started out last February. He made \$500.00 cash the first two weeks and was assured of another \$500.00 profit upon delivery of his next order!

V.C. sold over 800 packages in two weeks.

S.W. ordered 1000 packages and re-ordered 2000 more.

HOW DID THEY DO IT?

The fellows who are making \$10, \$15, even \$20 per hour with VX-6 aren't some kind of Super Salesmen that could sell refrigerators to eskimos. They're ordinary men, from all walks of life. Many of them never sold a thing before they decided to give VX-6 a try.

The important thing about them is this -- they ACTED when Opportunity knocked on their door. That same Opportunity is knocking on your door now ... and if YOU act, you can be enjoying the biggest, easiest money of your life just a few short weeks from now.

These men became National Dynamics representatives after learning about VX-6 and joining our organization. They came to us just as you are coming to us now. Almost all have become successful in a short period of time. The list is a large and impressive one.

DOES NATIONAL DYNAMICS DEAL DIRECTLY WITH OUTLETS?

Absolutely No! We in National Dynamics do business only through our representatives. We protect each and every one of our representatives on business developed and accounts opened. You are protected on all repeat sales and commissions as long as you are active with this organization. We believe that a strong organization can be built only by strong representation in the field. We do everything possible to strengthen YOUR position and to help YOU establish a sound business. From coast to coast, we're proud to report a loyal and prosperous structure of representatives. Prove yourself with us and we will back you all the way!

HOW GOOD IS VX-6?

Check the reports in this sales presentation from "A-1" companies. VX-6 has undergone the most strenuous tests and came through with flying colors. In fact, every package of VX-6 carries the U.L. (Underwriters' Laboratories) seal. You build confidence with your customers.

BETTER YET, CALL THE VX-6er NEAR YOU AND TALK IT OVER WITH HIM. I'LL PAY FOR THE CALL. FIND OUT FIRST HAND HOW GOOD VX-6 IS.

HOW DOES NATIONAL DYNAMICS STAND BEHIND ITS PRODUCT?

Each and every package of VX-6 comes with an iron clad guarantee. The product is fully tested, proven and protected by Product Liability Insurance.

1480

WHAT IS YOUR FUTURE WITH NATIONAL DYNAMICS?

It is the firm belief of the management of this company that its own future lies in the encouragement of promising representatives. If you are sincere and ambitious, if you want to do a job, the "sky is the limit" in this organization. Just as soon as you prove to yourself the money making potential of VX-6, you can qualify for an exclusive territory. Bear in mind, we prefer to discuss exclusive territory only after you are convinced you can make as much money as you want with VX-6. Just prove yourself and you will be pushed to the top. Extra profits are here for you!

ACT NOW !

Now that you have all the facts--you must decide how much they are going to mean to YOU! An extra \$40.00 a week? \$75.00 a week? \$200.00 a week or more? It's up to you...remember our successful men started out just like you--and nothing could stop them. Nothing can stop you either, once you get started. I'm looking forward to working with you. So use the enclosed postage free reply envelope and order form TODAY!

Sincerely yours,

Andy Scott

Andy Scott, Sales Manager
NATIONAL DYNAMICS CORP.

1481

S-6

FEDERAL TRADE COMMISSION

8303

51-D

DISCONTINUED

1765

#5

DISTRIBUTOR STARTED IN 1957 DISTRIBUTOR STARTED IN 1958 DISTRIBUTOR STARTED IN 1959 DISTRIBUTOR STARTED IN 1960 DISTRIBUTOR STARTED IN 1961 DISTRIBUTOR STARTED IN 1962 DISTRIBUTOR STARTED IN 1963 DISTRIBUTOR STARTED IN 1964 DISTRIBUTOR STARTED IN 1965



Wansons
sylvania



John Bort
Idaho



Alfred
W. Walters
Florida



Marshall Bloss
California



Warren Cooper
Texas



Henry Johnson
Massachusetts



Floyd R. Mode
Oregon



Frank A.
Krause
Wisconsin



Ernest
Marlowe Jr.
No. Carolina

Started selling VX-6 in 1957. His purchases of VX-6 to date amount to \$155,901.44

Started selling VX-6 spare time in 1958. Made \$1,029.00 profit in one month!

Started selling VX-6 in 1959. His sales for 1 MONTH ALONE amounted to \$6,435.00.

Started selling VX-6 in 1960. Latest reorder \$5,947.88. Says: "VX-6 is the hottest item I ever sold."

Started selling VX-6 in 1961. In one month alone he purchased \$18,494.00 worth of VX-6.

Started selling VX-6 in 1962. In less than four weeks he purchased \$8,654.00 worth of VX-6.

Started selling VX-6 in 1963. In 2 months he purchased \$1,879.00 worth of VX-6.

Started selling VX-6 in 1964. In just 15 days re-ordered 5 times and sold over \$2,000.00 worth of VX-6.

Started selling VX-6 part time in 1965. In just 2 weeks he sold out his first order and re-ordered over \$1,250.00 worth of VX-6.

FEDERAL TRADE COMMISSION
 Docket No. 8863 EXHIBIT No. 1142
 In the Matter of *National Dynamics Corp*
 Date _____ Witness _____ Reporter *1681A*

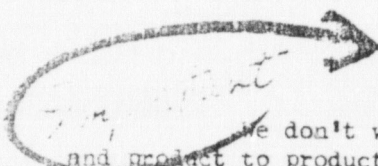
1000.00 EVERY MONTH

CX 217

living? Whether you are in direct selling, are retired, you can make a full time in-battery additive! No matter what you sell, now you spend your time, everyone you meet, know, talk to or contact has a car. Every car has a battery, and every battery needs VX-6.

WE ABSOLUTELY GUARANTEE YOUR SALES -- PROFITS -- REORDERS

You can't miss making an average of \$25 and more a day in spare time earnings, as much as \$50 to \$100 on week-ends alone, up to \$300 weekly and more, either as a side-line or as full time selling.



OVER 100% CASH COMMISSIONS FOR YOU
Protected Sales--Exclusive Territory

We don't want jackrabbit salesmen who jump around from day to day, and product to product. We stay with our men, and offer the kind of selling deal, territory protection and incentives to distributorships that make them stay with us.

VX-6 has a larger profit margin than any other automotive item. On a \$2.98 sale, you can make better than 100% clear profit!

GUARANTEED PROTECTED PROFITS IN YOUR TERRITORY

We want you to start making money with VX-6 right away, and build these sales into a regular snow-balling business, like the men on this page. So we Guarantee to protect you on business developed, on accounts opened and on repeat sales. Every account you open is yours as long as you remain active with us.

START TAKING ORDERS NOW!

1681-b

VX-6 can be sold in more ways and to more different customers than any other product you can name. You can sell direct to car owners, starting with your friends and neighbors, from door-to-door, store-to-store, to workers in plants and factories, in parking lots, etc. You can sell to fleet owners, business concerns with cars, cabs, fleets, municipalities (cities and towns are big customers). You can call on service stations and garages, local department stores, auto specialty shops, etc.

CX 1097A 609

NATIONAL DYNAMICS EXHIBIT 199
 OBTAINED BY *Ja. 10-10-68*
 BY *Ja. 10-10-68*
 ATTORNEY-EXAMINER
 FILE NO. *152238-23*

DISCONTINUED 1965

DISTRIBUTOR STARTED IN 1957	DISTRIBUTOR STARTED IN 1958	DISTRIBUTOR STARTED IN 1959	DISTRIBUTOR STARTED IN 1960	DISTRIBUTOR STARTED IN 1961	DISTRIBUTOR STARTED IN 1962	DISTRIBUTOR STARTED IN 1963	DISTRIBUTOR STARTED IN 1964	DISTRIBUTOR STARTED IN 1965
								
Twanson sylvania	John Bort Idaho	Alfred W. Walters Florida	Marshall Bloss California	Warren Cooper Texas	Henry Johnson Massachusetts	Floyd R. Mode Oregon	Frank A. Krause Wisconsin	Ernest Marlowe Jr. No. Carolina
Started selling VX-6 in 1957. Has purchased 144 to date amount to \$135.90: 47	Started selling VX-6 spare time in 1958. Made \$1,028.00 profit in one month!	Started selling VX-6 in 1959. His sales for 1 MONTH ALONE amounted to \$6,435.00.	Started selling VX-6 in 1960. Latest reorder \$3,947.38. Says "VX-6 is the hot- test item I ever sold."	Started selling VX-6 in 1961 in one month alone he purchased \$18,494.00 worth of VX-6.	Started selling VX-6 in 1962 in less than four weeks he pur- chased \$4,654.00 worth of VX-6.	Started selling VX-6 in 1963 in 2 months he pur- chased \$3,879.00 worth of VX-6.	Started selling VX-6 in 1964 in just 35 days reor- dered 5 times and sold over \$2,000.00 worth of VX-6.	Started selling VX-6 part time in 1965. In just 2 weeks he sold out his first order and reordered over \$1,250.00 worth of VX-6!

YOU TOO CAN EARN \$1,000.00 EVERY MONTH

Dear Friend:

What do you do now for a living? Whether you are in direct selling, have a full time job, go to school or are retired, you can make a full time income in spare time selling with VX-6 battery additive! No matter what you sell, who you sell to, who you work with or how you spend your time, everyone you meet, know, talk to or contact has a car. Every car has a battery, and every battery needs VX-6.

WE ABSOLUTELY GUARANTEE YOUR SALES -- PROFITS -- REORDERS

You can't miss making an average of \$25 and more a day in spare time earnings, as much as \$50 to \$100 on week-ends alone, up to \$300 weekly and more, either as a side-line or as full time selling.

OVER 100% CASH COMMISSIONS FOR YOU
Protected Sales--Exclusive Territory

We don't want jackrabbit salesmen who jump around from day to day, and product to product. We stay with our men, and offer the kind of selling deal, territory protection and incentives to distributorships that make them stay with us.

VX-6 has a larger profit margin than any other automotive item. On a \$2.98 sale, you can make better than 100% clear profit!

GUARANTEED PROTECTED PROFITS IN YOUR TERRITORY

We want you to start making money with VX-6 right away, and build these sales into a regular snow-balling business, like the men on this page. So we Guarantee to protect you on business developed, on accounts opened and on repeat sales. Every account you open is yours as long as you remain active with us.

START TAKING ORDERS NOW!

VX-6 can be sold in more ways and to more different customers than any other product you can name. You can sell direct to car owners, starting with your friends and neighbors, from door-to-door, store-to-store, to workers in plants and factories, in parking lots, etc. You can sell to fleet owners, business concerns with cars, cabs, fleets, municipalities (cities and towns are big customers). You can call on service stations and garages, local department stores, auto specialty shops, etc.

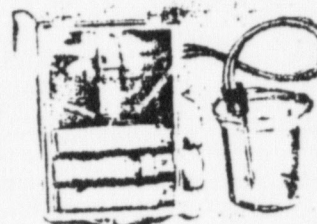
S-8

104P... 199
 OBTAINED BY
 FILE NO. 104P... 199
 ATTORNEY-EXAMINER

1681-6

NO EXPERIENCE NEEDED

We supply you with the most Dynamic Sales Kit ever offered and it is yours ABSOLUTELY FREE. In the few minutes it takes to go over your material, you become an automotive expert immediately because you have the national racing champ, Lee Petty, working for you and our new palm-sized electronic demonstrator unit that shows, proves and clinches every sale. It is the nearest thing to automatic selling ever created. And comes to you FREE with your order.



OVER 30 MILLION BATTERIES WENT DEAD IN TRAFFIC LAST YEAR!

A battery can go dead at any time. No matter how often it is charged, filled with distilled water, watched or cared for, it can go dead at any time. This is because sulphation is formed inside the battery--and no one can look into a battery, reach into a battery with tools to repair this condition! That's why motorists spend an average of \$360,000,000.00 per year on road service, re-charges and new batteries, every year. Battery failure happens even more often than flat tires!

THAT'S WHERE YOU COME IN WITH VX-6

Excessive sulphation is the major cause of battery failure. This is a soft, spongy film that hardens around the plates or grids, and chokes the battery to death! Like spreading putty over a window screen.

VX-6 DISSOLVES SULPHATION AND PREVENTS IT FROM FORMING FOR THE LIFE OF THE CAR!

It's as simple as that. Just pour VX-6 into the battery, right into the cells where you pour distilled water. You don't need experience, you don't need tools, you pour new life into a battery and protect it from sulphation for the life of the car.

IF YOU RECEIVED THIS LETTER---YOUR TERRITORY IS AVAILABLE NOW

Yes, your territory is available now with no cash risk to you! Every account you open is yours, with full credit on repeat business as long as you are active with us. You can work up to an override on the sales of new men in your territory, up to district or even state-wide distributorship.

Our current advertising and promotional campaign includes local TV, Radio, Magazine and Newspaper advertising - actually pre-selling VX-6 for you.

Over 4,000,000 packages have already been sold by men just like you to some of the largest corporations in the U.S., such as Fleets, Taxis, Service Stations, Stores and Governmental Agencies. Railroads are even using VX-6, one of them ranks among the top ten of the country.

ACT NOW and CASH IN!

FEDERAL TRADE COMMISSION

Order No. 8803 Commission's Exhibit No. 109B

You can make your fortune in a business of your own just by mailing the enclosed postage paid card. Get it in the mail today and I'll promise you the kind of offer, selling aids and help that has made earnings of \$600.00 a month look like chicken feed to so many VX-6 distributors -- all without your risking one penny!

Sincerely yours,

National Dynamics Corp. is one of the largest companies of its type in the world. We invite investigation through any bank or rating agency.

Andy Scott, Sales Manager

S-9

1682

NATIONAL DYNAMICS CORPORATION

NATIONAL DYNAMICS CORP.

Cx4

FEDERAL TRADE COMMISSION
Docket No. 843 COMMISSION EX-112 A
In the Matter of National Dynamics Corp.
Date _____ Witness _____ Reporter _____

220 EAST 23RD STREET
NEW YORK 10, N. Y.

CABLE ADDRESS:
NATIDYN-NEW YORK

MURRAY HILL 9-0180

From Andy Scott
National Dynamics Corp.
New York, N. Y.

10F15
National Dynamics Ex. 43-A
Obtained: 3/2/66 By Letter
By: G.F. Rosenblatt, Atty.-Ex.
File No. 6523825 gab

Dear Sir:

HOW MUCH DO YOU WANT TO EARN THIS YEAR?

() \$2,000.00 () \$5,000.00 () \$10,000.00
() \$15,000.00 () \$25,000.00

You'll know it is possible when you read these facts. So, read this carefully.

Don't try to read this material in a hurry. If you're busy right now, sit down in a quiet place after dinner and spend 30 minutes on your future! You will be richly rewarded for this investment of time and thought. This could be the turning point of your future.

WHAT IS VX6?

VX6 is a battery additive, so important, powerful interests have tried to keep it off the market for years. Now you can get in on the ground floor. VX6 is the hottest item to hit the specialty selling field, ever. There is not another automotive product on the market today that has the exciting, natural consumer appeal that VX6 has. Here is a product that not only ends battery troubles forever but gives more electrical power. Safety and effectiveness in one package! At a price everybody can afford. Every car owner, every business, every operator of a boat, truck or machine using wet cell batteries is a perfect prospect.

NO DEMONSTRATION TO PROVE NEED FOR VX6

VX6 is a sight seller. Just point to the tell tale green or white powdery formation around the battery. This is the sulphation which chokes the battery to death. VX6 prevents this and restores life to the battery.

I've sold a lot of top products for a lot of years, but I tell you, without question, that I've never seen a product move with the speed and the profit that VX6 does. And I think the answer is simple. Today, the motoring public is conscious of premium batteries, lifetime batteries and even cadmium batteries. Check your magazine ads, newspaper ads and radio and T.V., you'll see this is a fact. You'll find that these batteries cost anywhere from \$40.00 to over \$100.00 for industrial batteries. Secondly, every driver has a dread of getting stuck unexpectedly from a run down or dying battery. This is why VX6 sells like hot cakes.

S-10

1689

THE AVERAGE MAN WANTS THIS PROTECTION FOR HIMSELF AND HIS FAMILY BUT HE CAN'T

CX 112 A 157

AFFORD THE \$40.00 to \$100.00 PRICE. THAT IS WHY HE BUYS VX6. HE GETS THE SAME PROTECTION FOR ONLY \$2.98.

READ THESE FACTS

1. VX6 has the largest potential market of any automotive product. Every home has one or more cars. Every farm, industrial plant, delivery fleet, taxi, etc. needs and must have this protection.
2. VX6 is a small package and requires little storage space. You can double up on your selling by showing VX6 along with any other line you may be handling.
3. VX6 can be sold through more channels than any other direct selling product.
4. LARGER PERCENTAGE OF PROFIT ON SALES.
5. Additional sales developed through word of mouth advertising, from happy users.
6. VX6 is backed up with national advertising in magazines and newspapers to pre-sell your customers.
7. There are 70 million cars on the road. Every car, new or old needs VX6.
8. VX6 is now being sold in leading gas stations and automotive supply stores.

Now you can see why I said earlier this is the hottest item to hit direct selling.

BIG PROFITS!

Now I want to tell you, you CAN'T BEAT A PROFIT MAKING DEAL LIKE THIS ONE! On a \$2.98 sale, you can make \$1.65 selling direct to customers and fleet installations. Or, if you sell dealers you make \$7.67 a dozen. Obviously, you won't make as much profit per package selling wholesale but your profit per visit will run higher. On only 6 wholesale sales a day you make over \$46.00 and then your big profit is yet to come - in the form of repeat orders from these same dealers.

OUR MEN ARE MAKING MONEY

Take the case of Bernie Azif - Bernie is an ordinary fellow like you and me. He invested a few hundred dollars in VX6 about 4 years ago. Today he is an established respected member of his community. He has a business worth over \$100,000. He owns his own home and cars! He had none of this when he started handling VX6.

He started out in February. He made \$500.00 cash the first two weeks and was assured of another \$500.00 profit upon delivery of his next order!

VX6 sold over 300 packages in two weeks.

He sold over 1000 packages and received 1000 more.

FEDERAL TRADE COMMISSION

HOW DID THEY DO IT?

Check No. _____ Commission's Exhibit No. _____

These men became National Dynamics representatives after learning about VX6 and joining our organization. They came to us just as you are coming to us

2014
National Dynamics Ex. 43A 1690
Obtained: 3/2/66 By Letter
By: G.F. Rosenblatt, Atty.-Ex.
File No. 6523825 *jaB* *CX112B* *158*

now. Almost all have become successful in a short period of time. The list is a large and impressive one.

DOES NATIONAL DYNAMICS DEAL DIRECTLY WITH OUTLETS?

Absolutely No! We in National Dynamics do business only through our representatives. We protect each and every one of our representatives on business developed and accounts opened. You are protected on all repeat sales and commissions as long as you are active with this organization. We believe that a strong organization can be built only by strong representation in the field. We do everything possible to strengthen YOUR position and to help YOU establish a sound business. From coast to coast, we're proud to report a loyal and prosperous structure of representatives. Prove yourself with us and we will back you all the way!

HOW GOOD IS VX6?

Read the report from Public Service Testing Laboratories. Check the reports in this sales presentation from "A-1" companies. VX6 has undergone the most strenuous tests and came through with flying colors. In fact, every package of VX-6 carries the U. L. (Underwriters' Laboratories) seal. You build confidence with your customers.

HOW DOES NATIONAL DYNAMICS STAND BEHIND ITS PRODUCT?

Each and every package of VX6 comes with an iron clad guarantee. The product is fully tested, proven and protected by Product Liability Insurance.

WHAT IS YOUR FUTURE WITH NATIONAL DYNAMICS?

It is the firm belief of the management of this company that its own future lies in the encouragement of promising representatives. If you are sincere and ambitious, if you want to do a job, the "sky is the limit" in this organization. Just as soon as you prove to yourself the money making potential of VX6, you can qualify for an exclusive territory. Bear in mind, we prefer to discuss exclusive territory only after you are convinced you can make as much money as you want with VX6. Just prove yourself and you will be pushed to the top. Extra profits are here for you!

ACT NOW!

Now that you have all the facts--you must decide how much they are going to mean to YOU! An extra \$40.00 a week? \$75.00 a week? \$200.00 a week or more? It's up to you...remember our successful men started out just like you--and nothing could stop them. Nothing can stop you either, once you get started. I'm looking forward to working with you. So use the enclosed postage free reply envelope and order form TODAY!

Sincerely yours,

30F15
National Dynamics Ex. *434*
Obtained: 3/2/66 By Letter
By: G.F. Rosenblatt, Atty.-Ex.
File No. 6523825 *JLB*

Andy Scott
Andy Scott, Sales Manager
NATIONAL DYNAMICS CORP.

1691

S-12

FEDERAL TRADE COMMISSION

Order No. Commission's Exhibit No.

EXHIBIT 154

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL DYNAMICS CORPORATION,
a corporation, and ELLIOTT
MEYER, individually and as an
officer of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

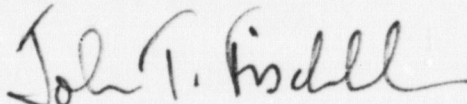
Respondent.

No. 75-4179

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
enclosed Brief for Respondent upon counsel for National
Dynamics Corporation, a corporation, and Elliott Meyer,
individually and as an officer of said corporation, by
mailing a copy, first class, postage prepaid to:

Jerold W. Dorfman, Esq.
Friend & Dorfman, P. C.
Davis, Gilbert, Levine and Schwartz
500 Fifth Avenue
New York, New York 10036



JOHN T. FISCHBACH
Attorney

Dated: January 13, 1976